Trencor, Inc. *and* United Steelworkers of America, AFL–CIO, CLC. Case 16–CA–17725

June 18, 1998

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND HURTGEN

The issue in this test-of-certification proceeding is whether the judge correctly found that the Respondent failed to prove, in defense of its refusal to recognize and bargain with the Union, that the Union engaged in objectionable conduct and interfered with employees' free choice in the representation election underlying the Union's certification as collective-bargaining representative of a unit of the Respondent's employees.[1] The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as set forth in our original Decision and Order, 320 NLRB No. 78 (Feb. 26, 1996).[4]

ORDER

The National Labor Relations Board reaffirms its original Order and orders that the Respondent, Trencor, Inc., Grapevine, Texas, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

Elizabeth Washka, Esq., for the General Counsel.
M. Brett Burns, Esq., for the Respondent.
Bruce Fickman, Esq., for the Union.

[1] On January 15, 1998, Administrative Law Judge William N. Cates issued a bench decision. On February 4, he issued the attached supplement to bench decision pursuant to Sec. 102.35 of the Board's Rules and Regulations. The Respondent filed exceptions and a supporting brief. The Charging Party filed a limited cross-exception to correct the transcript and a reply brief. The Respondent filed a response to the Charging Party's limited exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We grant the Charging Party's motion to correct the transcript. The correct date on L. 3, p. 88 of the appendix to the judge's decision is August 3.

[3] Member Hurtgen adopts the judge's finding that the Union did not make the alleged preelection ''Union-party'' promise. Accordingly, he finds it unnecessary to rely on the judge's alternative finding that even had such a promise been made, it was not objectionable.

[4] This summary judgment decision is not reported in Board volume 320.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This case was heard pursuant to the National Labor Relations Board's (the Board) unpublished Supplemental Decision and Order Directing Hearing (Chairman Gould and Members Fox and Higgins) issued on November 12, 1997, in *Trencor, Inc.*, Case 16–CA–17725. In its supplemental decision, the Board noted it issued, on February 26, 1996, an original Decision and Order in this proceeding. *Trencor, Inc.*, 320 NLRB No. 78.[1] In its original Decision and Order, the Board found that Trencor, Inc. (the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing United Steelworkers of America AFL–CIO, CLC's (the Union) request to bargain and to furnish necessary and relevant information following the Union's certification in Case 16–RC–9800.[2] In so finding, the Board rejected, what it considered, the Company's attempts to relitigate issues raised in the prior representation proceeding. The Company filed a petition for review of the Board's Order (320 NLRB No. 78) with the United States Court of Appeals for the Fifth Circuit and the Board cross-petitioned for enforcement. The Fifth Circuit Court of Appeals, on April 8, 1997, issued a decision[3] denying enforcement of the Board's Order and remanded this proceeding with instructions to hold an evidentiary hearing on the Company's postelection objection alleging that the Union interfered with employees' free choice by promising ''the biggest party in the history of Texas,'' and that the Union would buy ''all the food and beer.'' The Board accepted the court's remand, regarding it as the law of the case, and ordered the evidentiary hearing limited to the Company's aforementioned election objection.

On January 15, 1998, following a 1-day trial in Fort Worth, Texas, I rendered a Bench Decision[4] finding no merit to the Company's postelection objection. I found no creditable evidence that Union Agent Bill Fears, or any other agent of the Union,[5] ever at any preelection time promised a party (big or otherwise) if the Union won the election. Union Agent Fears did tell employees they could, and would, meet at a shade tree near the plant following the election, regardless of the outcome, to celebrate or cry.

There is no dispute that a postelection party was held; however, the idea and planning for the party did not take place until after the election had been held. The postelection announcement for the party reads in part as follows:

> Now you have a Union. Now it's time to make your Union a good one, and that takes everyone working to-

[1] The Board's summary judgment decision is not included in Board volume 320.

[2] The underlying representation election was held on August 3, 1995.

[3] *Trencor, Inc. v. NLRB*, 110 F.3d 268 (5th Cir. 1997).

[4] I rendered the Bench Decision pursuant to Sec. 102.35(a)(10) of the Board's Rules and Regulations.

[5] I concluded company employee and in-plant committee member DeLARA was not an agent of the Union and that if he made any statement regarding a party it was made postelection. Even if he had made a preelection statement regarding a party, such is not attributable to the Union. See, e.g., bg*Windsor House C & D*, 309 NLRB 693 (1992), and *Advance Products Corp.*, 304 NLRB 436 (1991).

gether. Starting now, the PAST IS PASSED. Whether you fought *for* or *against* makes no difference now. We are all in the same family and *TEAMWORK* is now the key to *PROGRESS*.

There is nothing more ''American'' than a good battle at election time. But it's also very ''American'' to all join together for progress after the majority has spoken. There were lots of good people on both sides of this campaign. We need all of them on the same side now.

. . . .

To start the process of TEAMWORK, we want to invite *everyone* and their family to a Victory Picnic [August 12, 1995].

. . . .

I concluded the Union did not engage in any objectionable conduct by its participation in, and sponsorship (to the extent it did) of, this postelection party to which everyone was invited.

I certify the accuracy of the portion of the transcript, as corrected,[6] pages 83 to 94 (inclusive) containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as an appendix.

CONCLUSION OF LAW

The Company's postelection objection is without merit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

It is recommended the Company's postelection objection be overruled.

[6] I have corrected the transcript by making physical inserts, crossouts, and other obvious devises to conform to my intended words without regard to what I may have actually said in the passages in question.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX

BENCH DECISION

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Administrative Law Judge's Exhibit 1, the two-page affidavit, just so the record is clear, is identical to Union 20, which you labeled the affidavit as Union 20. Union 20 was not received in evidence, because no one offered it, but of my own motion I am receiving the affidavit and relabeling it as Administrative Law Judge's Exhibit 1.

(Document above referred to was marked for identification as ALJ Exh. 1 and received in evidence.)

JUDGE CATES: This is my decision. In deciding the case, I'm going to cover a few background points over which there should be no dispute, and even if my notes are incorrect on the background information, all of that information is set forth in the Board's earlier decision, or in the circuit's decision, or in the Order setting this hearing. I have simply inked out some notes that I think would be helpful to anyone understanding my decision or reviewing the case.

All I'm pointing out is that if these background facts are incorrect, they can easily be corrected by referring back to the Board's decision reported, I believe it is, in volume 320, and the circuit court's decision, which is 110 F.3d 268 (5th Cir. 1997).

So all of these facts that I'm putting out as background are facts that you can readily review and see if they are correct.

The election was held on August 3, 1995, there were 99 eligible voters, 70 voted for the Union, 26 voted against the Union, there were 9 challenged ballots, the challenged ballots

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were not sufficient in number to affect the outcome of the election. The Company filed objections to the election, the Regional Director for Region 16 recommended the objections of the Company be overruled; thereafter, the Union was certified as the collective-bargaining representative.

The Company refused to bargain with the Union, and in November 1995, the Union filed unfair labor practice charges against the Company. The Company admitted that it was refusing to bargain, but asserted the Union's misconduct had tainted the election, and that the election should be set aside.

On or about February 26, 1996, the Board issued its Decision and Order, and granted the General Counsel's Motion for Summary Judgment, that is, a motion for summary judgment, with respect to refusing to bargain and a refusal to provide information.

The Board concluded the Company's objections should, or were, litigated in the representation proceeding.

The Board, in it's Order, directed the Company to bargain with the Union, post appropriate notices, and comply with the Union's request for information. The Company appealed that decision of the Board to the Fifth Circuit Court of Appeals, and the Board cross-petitioned.

On April 8, 1997, the Fifth Circuit Court of Appeals decided the case, and in doing so, the court addressed, ''the biggest party in Texas,'' and made reference to the contention the Company was making, that the Union offered

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conditional inducements to win employees' support in the election. Specifically the Company contended Union Agent Bill Fears told employees that if the Union won the election, it would host, quote, ''The biggest party in the history of Texas,'' close quote, and that the Union would buy, quote, ''All the food and beer.''

The circuit court remanded the case to the Board, and the Board, in turn, in an unpublished order, directed the division of judges to hold a hearing on the Company's objection. Specifically, the circuit court and the Board ordered that I consider what evidence, if any, would support the contention that the Union, through its agent, Bill Fears, promised that the Union would host the biggest party in the history of Texas, and that the Union would buy all the food and beer.

Before I decide the facts and announce those, let me just briefly refer to the standards that the Board requires in conducting elections.

The Board's standards must reasonably further the goal of providing an atmosphere in which employees can make unconstrained choices concerning unionization.

The goal of holding representation union elections is to allow employees to choose freely and fairly whether they want the union to act as their collective-bargaining representative.

Free and fair decisions, whether employees want a union to act as their collective-bargaining representative, are impossible

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if the atmosphere surrounding the election is poisoned by cohersive conduct, which induces employees to base their vote, not their convictions, but on a fear, or on other improper considerations.

Having said that, the laboratory conditions test of the Board must be applied realistically, with the result that less than perfect campaigns will not always require setting aside an election. The Board has a policy against inducements made during the course of a union election, and that policy is rooted in the idea that employees' votes should be governed only by consideration of the advantages and disadvantages in unionization in his or her work environment, and not by any extraneous inducements of a pecuniary value.

Now, that's the standard I will be applying to the facts, as I will find them herein.

First, what, if anything, did Mr. Fears say at the August 2 meeting he held with employees regarding the upcoming election the next day? First off, Mr. Fears denied he made any mention at that meeting, or at anytime during the campaign, that if the Union won the election, they would host the biggest party in Texas. He denied making that statement, or making a statement to that effect.

I credit Mr. Fears' testimony that he did not make such a statement. Mr. Fears acknowledges, however, he made a statement that they would all get together at the tree after the

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election, no matter what the outcome was. He said that they would either get there and cry together or celebrate together. I credit that testimony.

The parties did meet at the tree after the election, and it is undisputed that at least some of those gathered there were drinking beer. I think Mr. Fears acknowledged that he perhaps brought either a 6-pack or a 12-pack, he couldn't recall which, and they drank at the tree that afternoon.

I find that credible testimony, based on a number of factors. The employees that testified here, specifically Mr. Wallis, acknowledged the tree was a place where they'd gather even before the advent of the Union, and drink beer from time to time. Mr. Whitaker indicated that this was not something new, drinking beer at the tree, which was a short distance from the plant and also close to a convenience store that sold beer, it worked out very fine both ways, it looks like. So I find they did meet, and they did consume beer at the tree, following the election.

Mr. Fears testified, and I again credit his testimony that the employees raised the possibility of having a further party later on that resulted in the party that was held on August 12, as depicted in the Union's Exhibit 3. The party was held at the Silver Lake Park in Grapevine, Texas.

There's no question that the Union publicized that party, and encouraged all to attend the party, to the extent of putting out fliers that were printed in English on one side and Spanish on the

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other side.

So I find the Union, after being asked by the employees at the tree on August 3 arranged for, as Mr. Fears testified, the party at Silver Lake, to the extent that it was he who contacted the local authorities at the particular park to be able to have the party there, and that the Union purchased and took to the party hamburger patties, hot dogs, and the wrappings, the bread wrappings, I believe he made reference to, the buns for the hamburgers and hot dogs, and perhaps even purchased some of the beer.

I think it's further undisputed, based on the testimony of Mr. Wallis and Mr. Fears, that various of those individuals attending that party on August 12 brought ribs, barbecue, potato salad, and other food items, as well as other beer items, to this party. I persuaded, in conjunction with Mr. Fears' testimony, that the party probably started around 3 o'clock. Mr. Fears says he concluded the party at around 10 o'clock. Then we have a little conflict with Mr. Wallis saying that the party didn't start at that time, and that he shut it down at 3 or 4 o'clock in the morning.

That discrepancy in testimony does not bother me in the least, nor does it impact the outcome of this case, in my opinion I don't think there's anything terribly inconsistent with that; perhaps, Mr. Wallis and some others did stay until 3 or 4 o'clock in the morning, or maybe they left earlier. If they were

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drinking, I don't think it would be unreasonable to conclude that maybe they weren't watching their watches as to when they left there.

So, I find the Union publicized this party that was held on August 12. I find they purchased food supplies, not all of the supplies for the party, but food supplies for the party, and some beverages for the party. I believe Mr. Fears even testified he didn't make a good estimate as to how many people would be there, because they ran out of food.

Does the fact that the Union gave this party, or arranged for this party, or even termed it in their flyer as, ''A victory picnic,'' impact the outcome of this election to such a manner that it would constitute objectionable conduct? The answer, in my opinion, to that question is clearly, no, it did not, based on the evidence that I have credited.

The party was not arranged for nor discussed until August 3, that is, whichever day the election was held, the discussions of the second party came about at the meeting at the tree that followed the election.

So the arrangements for the picnic on August 12 could not have had an impact on the outcome of the election, because it was not conceived or announced prior to the election.

And if you read the flyer that the Union provided it invited all individuals to attend the party. They clearly make it known that whether you

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fought for or against the union makes no difference now, we're all in the same family, and teamwork is the key to progress, so the party was for everyone. They noted that it was sort of the American way to have a good battle at election time, and then everyone join together after the results are known.

So the question comes: Does any of the statements made by Mr. Fears, or any of the conduct of the Union that's outlined in the evidence before me, constitute objectionable conduct to the election? The answer is no, in my opinion, because the meeting at the tree on the day of, but following the election, was for the stated purpose of crying or celebrating, it was not based on the the outcome of the election.

The second party that was held on August 12 was in the nature of bringing the employees together for the further good and to further the aims of the employees, as envisioned by the Union, and was not based on a reward or any vote in the election.

That does not, however, resolve the entire issue here. We heard the testimony of Mr. Whitaker that he was told by Mr. DeLara that Mr. DeLara had been to a union meeting the day before election, and then came to work, and he walks up to Mr. Whitaker, based on Mr. Whitaker's testimony, and told him they had had this union meeting last night, and that Mr. Fears had said they were going to have the biggest party in Texas, with all the beer and food they could consume.

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Mr. Whitaker said he and Mr. DeLara discussed whether this would be the biggest party in Texas, or whether Miller Lite Beer had talked about having a party in Texas and had billed their party as being the biggest party in Texas.

Mr. Whitaker said he was fearful that free alcohol would persuade voters, because of so many people gathering down at the tree from time to time and drinking beer.

Mr. Whitaker is no longer employed by the Company, he says he has no connection to the Company, that the only contact he's had with the Company since he left there was that he contacted a woman friend at the plant on at least one occasion.

So what motive does Mr Whitaker have, if any, to misstate the facts? There's not a lot of evidence here that would indicate that Mr. Whitaker would deliberately misstate facts.

I have some trouble, however, with Mr. Whitaker's testimony, for the following reasons. Mr. Whitaker readily acknowledged he did not hear Mr. Fears make any statement with respect to any parties, that he heard it only from Mr. DeLara. Mr. Whitaker acknowledged he didn't attend the parties, either of them, but he's testifying to what Mr. DeLara told him. Mr. DeLara did not testify in this proceeding.

I am persuaded that Mr. DeLara spoke with Mr. Whitaker, based on the detail which Mr. Whitaker goes into, but I'm fully convinced that the meeting did not take place as testified to by Mr. Whitaker the day before or the day of the election. I'm

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persuaded it took place at some point after that fact, when the party had been arranged for, which would place it after the election.

I so conclude among other reasons, because of the credited testimony of Mr. Fears that he never made any such statement, and that any statements Mr. DeLara made to Mr. Whitaker, if made at all, took place after the election, not before. But assuming arguendo that Mr. DeLara said to Mr. Whitaker exactly what Mr. Whitaker testified to, and that it did take place either the day before or the day of the election, or at any other time before the election the result would be same.

I find there's insufficient showing on this record that the Union knew of, instigated, condoned, or was responsible for the comments of Mr. DeLara, even if made.

But, again, I do that based on the credited testimony of Mr. Fears that he didn't say this, he had no knowledge of it, the first knowledge that the Union had of this statement was when the Company filed its objections to the election.

It was only that point that the Union learned of the contention advanced by Mr. Whitaker that Mr. DeLara had said the comments attributed to him by Mr. Whitaker.

Therefore, did the comments that Mr. Whitaker testified to taint the results of the election, even if made, and the answer is no, because I'm persuaded that it did not take place before the election, if it took place at all.

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I'm even persuaded, that assuming arguendo, it did take place before the election, that the Union did not know of, instigate, or condone the comments by Mr. DeLara.

So having concluded that, there was no objectionable conduct based on the credited evidence, I shall direct that the Company's objection to the election that is before me be overruled, and that the Board and the courts validate the election, and uphold the certification of the Union as a collective-bargaining representative, with all that entails.

I need not go further into that, because the remand from the circuit to the Board, and the Board to me speaks only to my making findings of fact and conclusions of law with respect to whether there's validity to this objection or not, and I've concluded there is not.

The procedure for filing exceptions to my decision, as I understand the Board's Rules and Regulations, is that I will, once I receive a copy of the transcript, make any necessary corrections thereon and certify the pages of the transcript containing my decision as my decision and serve it on the parties. It's my understanding that the appeals period commences to run from that date. Please, and underline this, follow the Board's Rules and Regulations, don't rely on my understanding of those rules and regulations.

Let me state that it has been a pleasure to be in Fort Worth,

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Texas, and I appreciate the professional manner in which the case was presented by all parties, including the Government's statement that they have no horse in this race, and the fact that they were able to produce the only affidavit in

this case, which by the way, I made a part of the record herein. With that, this trial is closed. Off the record.

(Whereupon, at 2:10 p.m., the hearing in the above-entitled matter was adjourned.)